In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-148

IN THE MATTER OF SOLOMON BLOCK AND ROSALIND BLOCK,
Bankrupts.

SOLOMON BLOCK,
Bankrupt - Petitioner

vs.

SYLVIA CONSINO, et al.,
Creditors - Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 3, 1976.

CITATIONS TO OPINIONS BELOW

The order of Judge E. Avery Crary *re* Civil Contempt, issued May 17, 1974, in Proceedings in Bankruptcy, No. 73-13117, in the Central District of California. It is appended herewith as Appendix B.

The opinion of the Circuit Court of Appeals is unreported and appears as Appendix C, *infra*.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed on May 3, 1976. The instant petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The federal statutes involved are Bankruptcy Act §7a (10), 11 U.S.C. §25(a)(10) (1970); Organized Crime Control Act of 1970, Title II, 18 U.S.C. §§6002-6004, Pub. L. No. 91-452, 84 Stat. 922; Rules of Bankruptcy Procedure, Rule 920; and the self-incrimination provision of the Fifth Amendment, appended herewith as Appendix A.

QUESTIONS PRESENTED

1. Whether a bankrupt can suffer civil contempt for failure to answer questions at a first meeting of creditors in a bankruptcy proceeding in reliance upon his constitutional right against self-incrimination where the bankrupt's testimony would incriminate him in pending federal criminal indictments and where the bankrupt has not been given specific immunity pursuant to the Organized Crime Control Act of 1970.

2. Does the automatic immunity provision of Bankruptcy Act §7a(10), 11 U.S.C. §25a(10) provide constitutionally adequate immunity which is co-extensive with the Fifth Amendment privilege?

3. Does the combination of extensive pre-trial publicity, the great magnitude of the bankruptcy and multi-district litigation, and the simultaneous existence of federal criminal indictments constitutionally require greater immunizing measures than provided by Bankruptcy Act §7a(10), 11 U.S.C. §25a(10)?

4. Can a contempt be upheld for refusal to answer questions where the questions were not material to the purpose of the proceeding but were propounded to elicit testimony to be used in different litigation?

5. Is §7(a)(10) of the Bankruptcy Act constitutional without expressly including objective standards to assure that no testimony compelled under Bankruptcy Rule 205(b) nor any evidence directly or indirectly derived therefrom can be offered in evidence against the bankrupt in any criminal proceeding?

6. Can the instant contempt be upheld where the Bankruptcy Court failed to allow petitioner the written notice and hearing required by Bankruptcy Rule 920?

STATEMENT

Petitioner, a public accountant, was an employee of the public accounting firm of Wolfson, Weiner & Company (later Wolfson, Weiner, Ratoff & Lapin, which firm combined its practice in 1972 with that of the national public accounting firm of Seidman & Seidman) and at all times relevant hereto was primarily in charge of the certified year-end audits of Equity Funding Corporation of America ("EFCA"). The story of the massive inside corporate conspiracy of EFCA is well known, *cf.* R. L. Dirks *The Great Wall Street Scandal* (McGraw-Hill 1974, New York), R. L. Soble and R. E. Dallos *The Impossible Dream — The Equity Funding Story: The Fraud of the Century* (Signet, 1975, New York). Petitioner and his entire staff of auditors were some of the primary victims of the fraud at EFCA.

Because of the complexity and the horrendously large civil liability incident to petitioner's role in the audits of

EFCA (hundreds of millions of dollars in liabilities, *cf. In re Equity Funding Corporation of American Securities Litigation,* MDL Docket No. 142-MML, a class action consolidated in the Central District of California), petitioner commenced voluntary bankruptcy and was adjudicated bankrupt on November 14, 1973, in Case No. 73-13117 in the United States District Court, Central District of California. Petitioner appeared at the continued first meeting of creditors on January 7, 1974, before the Honorable Russell B. Seymour, Bankruptcy Judge. This was after extensive examination of the bankrupt Petitioner at the first meeting of creditors on December 11, 1973. Examination of Petitioner was conducted exclusively by counsel representing "May Miller and others" and "Sylvia Consino and others". May Miller and Sylvia Consino are named plaintiffs in the civil multi-district class action, *ante,* and were listed on petitioner's bankruptcy Schedule A-3 as contingent creditors whose only known addresses were through their counsel. At the time of said meeting and examination neither plaintiff had filed a claim against the bankrupt's estate. At the same time petitioner knew of the 105-count federal grand jury indictments which were erroneously returned against him (and others) for his alleged complicity in the fraud at EFCA. The 105-count indictment was returned November 1, 1973 in Los Angeles.

At such meeting and examination petitioner refused to answer all questions concerning his role and that of his audit staff for responsibilities in the EFCA audits, asserting his Fifth Amendment right against self-incrimination. The bankruptcy judge found the questions material and directed petitioner to answer said questions on the ground that the immunity provided in Bankruptcy Act, Section 7(a)(10) [11 U.S.C. §25(a)(10)] was co-extensive with the Fifth Amendment privilege against self-incrimination at a first meeting of creditors. (R.T. First Meeting of Creditors,

December 11, 1973, pp. 20-21, 27-29; and R.T. Continued First Meeting of Creditors, January 7, 1974, p. 6).

Four months later on May 7, 1974, the creditors' counsel secured a Referee's Certificate re Contempt from Bankruptcy Judge Seymour based upon Petitioner's invocation of his Fifth Amendment privilege. On May 8, 1974, United States District Judge Crary entered an Order to Show Cause re Contempt.

On May 13, 1974, and May 17, 1974, hearings re contempt were held before United States District Judge Crary.

On May 17, 1974, Judge Crary ruled that petitioner was in civil contempt for his refusal to answer those questions specified in the Petition re Contempt, and ordered petitioner confined for a period not to exceed the life of the bankruptcy proceedings or until he purge himself of the contempt. (R.T. May 17, 1974, p. 35, and Appendix B. herein).

Petitioner moved for reconsideration and stay of execution pending review. The stay was denied May 24, 1974, by United States District Judge Jesse W. Curtis.

A timely Notice of Appeal was filed May 24, 1974, and resulted in the unpublished opinion appended herewith as Appendix C.

REASONS FOR GRANTING THE WRIT

I

A. The "automatic" immunity provisions of the Bankruptcy Act [§7(a)(10)] were not intended to remain automatic after the conforming amendment of the Organized Crime Control Act of 1970. Therefore Petitioner was never given official immunity (from any source) and therefore could not be forced to give testimony against an assertion of his Fifth Amendment privilege.

Petitioner was never given a specific grant of immunity pursuant to Federal Criminal Statutes (18 U.S.C. §6002-6004). Nor was he given any grant of immunity by anyone at any time. The Bankruptcy Judge merely inferred that the "provisions of Section 7" disallowed the Fifth Amendment as a ground for the bankrupt's refusal to answer questions. (R.T., January 7, 1974, p. 13, lines 1-4 R.T., December 11, 1973.)

> "A review of the cited legislative history indeed would appear to *raise substantial questions* as to whether or not Congress intended Subsection 7(a)(10) to *continue to be self-executing* following its amendment."

McGuire, "Immunity Under the Bankruptcy Act Automatic or Controlled?" 48 *Am. Bankruptcy L.J.* 159, 160 (1974), emphasis added.

The general federal immunity statute created in Title II of the Organized Crime Control Act of 1970 (18 U.S.C. Part V, §§6001-6005) specifically provided in §259 thereof for repeal of

> ". . . any other provision of law inconsistent with the provisions of Part V of Title 18 . . . ."
>
> H.R. 91-1549, 91st Cong. 2nd Sess., (1970), at 8; *cf.* McGuire, *supra,* at 162.

The inconsistency between §7(a)(10) with its "automatic", self-executing immunity and Part V of Title 18 (§§6001-6005) with its extensive establishment of administrative criteria and conditions of authorization before immunity can be effectively granted, clearly cause §7(a)(10) to fall within the specific repealer provision, §259, *supra.*

Congress clearly intended that

> ". . . [n]o longer will any witness *automatically* receive immunity under statutes that Title II will repeal; . . ."
>
> 116 *Cong. Record* 35291 (House, October 7, 1970, column 2), emphasis added.

It was precisely this "automatic" feature which had rendered our nation's first immunity statute unworkable:

> "Congress first adopted a compulsory immunity statute in 1857.... The operation of the statute was *automatic,* it was not necessary to claim the privilege, and this led to dissatisfaction with its operation. In its place, therefore, the Immunity Statute of 1862 was enacted."
>
> S.R. 91-617, 91st Congress, 1st Session, at 52, emphasis added.

Section 7(a)(10) on its face still provides the *automatic* immunity "bath" Congress was careful to avoid in §6002. Without doubt §6002 intended to repeal §7(a)(10).

> "*Immunity.* This title unifies and expands existing Federal law dealing with the granting of immunity from self-incrimination in legislative, administrative, and court proceedings. *All previous legislation is repealed.*"
>
> S.R. 91-617, 91st Congress, 1st Session, at 32, emphasis added.

The issue is clear. Bankruptcy §7(a)(10) represents a drastic departure from the carefully and strongly stated purposes of the all-encompassing plan for comprehensive criminal immunity administration enacted in 1970. It is greatly inconsistent with the latter and was therefore specifically repealed by it. Petitioner herein was denied due process in suffering contempt at the hands of a non-existent immunity provision.

B. Secondly, the self-executing immunity of §7(a)(10) expressly contradicts the well-established and mandatory duty of the bankruptcy court to

> ". . . report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed."
>
> 18 U.S.C. §305 7(a), in part

Far from granting him statutory criminal immunity, the bankruptcy judge must report the witness to the United States attorney for criminal prosecution where the facts developed at his examination warrant it. The erroneous recognition of automatic §7(a)(10) immunity places the bankruptcy judge in an intolerable dilemma. This court must resolve that statutory dilemma by finding the immunity of §7(a)(10) — or the self-executing application thereof — expressly repealed by §259 of the 1970 act.

Petitioner's Fifth Amendment privilege remained intact and could not be abrogated by a defective implied proffer of §7(a)(10). The instant contempt was therefore improper and remains so until co-extensive immunity is granted.

C. Thirdly, the bankruptcy judge cannot authoritatively proffer a grant of immunity. Only the United States Attorney (under the direction of the Attorney General or his designate) can do that. 18 U.S.C. §6002(b).

Section 7(a)(10) apparently — and erroneously — authorizes the bankruptcy judge to give grants of criminal immunity. Such was never congressionally intended. The 1970 Act intended all immunity procedures to be administered through the criminal prosecutor. Congress intended one singular granting authority — the Attorney General:

> "The Attorney General of the United States would initiate immunity grants in courts and before grand juries . . . his approval would be required for the issuance of an immunity order by a federal agency, and . . . he may require indefinite deferral of the issuance of an immunity order by either House of Congress or one of its committees."
>
> H.R. 91-1188, 91st Congress, 2nd session, at 7, under the heading "Purpose of the Bill"

The very purpose of 1970 Act was to consolidate the various immunity provisions scattered throughout the federal statutes:

> "Title II provides for a *uniform* immunity statute in place of the 90 various statutes that would presently apply."
>
> 116 *Cong. Record* 35313 (House, October 7, 1970, Columns 1-2); *cf. id.* at 35291 (Column 1): "replaces some 50 Federal immunity statutes now in use with a *single, comprehensive provision* . . . to govern grants of immunity in judicial, administrative, and congressional proceedings." Emphasis added.

It was never intended by Congress that the Attorney General should gain supervision over all immunity grants *with the single exception of the bankruptcy court.* Hardly. The 1970 Act (comprehensively entitled "Federal Immunity of Witnesses Act," H.R. 91-1188) comprehended immunity grants stemming from all congressional, adminstrative, or judicial occasions. It certainly encompasses the bankruptcy court.

Petitioner herein was never properly and authoritatively extended immunity. He cannot therefore suffer contempt.

2.

If we assume (erroneously) that Congress did not intend to repeal the immunity provision of §7(a)(10) or the self-executing aspect thereof, we then must admit that Congress intended to amend §7(a)(10) by the conforming amendment (§207 of the Organized Crime Control Act of 1970) to read exactly as Congress wanted it to read. *Expressio unius est exclusio alterius.*

The language of the section then becomes primarily significant and no amount of judicial editorializing can gainsay the express language of the amended statute itself. In this instance the circuit court's demeaning of statutory language differences totally misses the mark.

The unreported opinion below assumed [based on its *per curiam* opinion in *Goldberg v. Weiner*, 480 F. 2d 1067 (9th Cir. 1973)] that the congressional intent underlying 11 U.S.C. §25(a)(10) (hereinbefore [Bankruptcy Act] "§7(a)(10)") is identical to the congressional intent underlying 18 U.S.C. §6002 (hereinbefore "§6002"), *i.e.*, to provide solely "use and derivative use" immunity in both the criminal and bankruptcy contexts — despite the obvious differences in the language of the two statutes:

> "We have previously held that Section 7(a)(10) is co-extensive with the Fifth Amendment and with Section 6002, and reaffirm that holding herein. *Goldberg v. Weiner, supra.* In *Goldberg,* we rejected distinctions based upon variations in language of the two sections, and herein we reject the distinctions suggested by Block."
>
> Appendix C, p 5, lines 30-35.

Does *Goldberg v. Weiner* resolve the issue? *Goldberg* specifically held that

> "...the Bankruptcy Act demonstrates that Congress intended to require the bankrupt to testify to the extent that he could be legally required to so do."
>
> *Goldberg, supra,* at 1073.

Is that the correct construction of congressional intent? No it is not.

> "It is doubtful that the statement of the court [in *Goldberg* immediately *supra*] is correct; for that matter, *it is doubtful that the intent of Congress was to change the scheme of the Bankruptcy Act by means of the Organized Crime Control Act.* It is more probable that Congress did not recognize the effect of this amendment on bankruptcy immunity, and in a desire to conform all immunity statutes to the planned scope of the general immunity section of the Organized Crime Control Act *inadvertently* altered the plan of the Bankruptcy Act."
>
> Feder, "The Future of Testimonial Immunity in Bankruptcy Proceedings," 48 *So. Calif. L. Rev.* 92, 116 (1974), emphasis added.

By misreading "inadvertence" the court below erroneously misconstrued congressional intent. If Congress truly intended to supplant §7(a)(10) with fully co-extensive §6002 immunity, why did it not also conform the amending language to match that of §6002?

Section 6002 immunity extends to "testimony or other information." The difference is patent: "information" encompasses much more than merely "evidence". A bankrupt could easily give "information" which would not be "evidence" at the first meeting of creditors, *e.g.* he could give information off the record, or before being sworn to testify, or after such, or during a recess, or in conversation with individual creditors, or overheard conversations with third persons, or with the court reporter, etc.

That Congress clearly understood the conceptual and legal differences between "information" and its lesser-included "evidence" is obvious from their consideration of these very concepts in Title X of that same Organized Crime Control Act of 1970:

> "The bill clerk read as follows:
>
> On page 93, line 15, strike the word 'information' each time it appears and substitute the word 'evidence'.
>
> 116 *Cong. Record* 963 (Senate, January 23, 1970, Column 1), emphasis added, *cf. id,* at Column 2.

The amendment was defeated, and it shows Congress' clear recognition of these two differing concepts. Indeed, the current 18 U.S.C. §3577 is framed in terms of "information" rather than "evidence"."

Petitioner agrees with the Appellate Court below that this Court did not consider in *Kastigar v. United States* 406 U.S. 441 [32 L.Ed.2d 212, 92 S.Ct. 1653] (1972), the issue of clear differences in language between the bankruptcy statute and the criminal statute. Nor has this Court ever held §7(a)(10) constitutionally co-extensive with the Fifth Amendment privilege. The appellate court below (the same court in *Goldberg v. Weiner, supra)* erred in claiming that

> "[t]he language used in [the] section . . . is not sacrosanct . . ."
>
> Appendix C, p. 5, line 27.

Since when is statutory language *not* sacrosanct for purposes of statutory construction? It is *always* so. The whole purpose of the Organized Crime Control Act of 1970 was to turn mere "information" into "evidence". The foremost concern of the drafters was to "untaint" sources of

"information" so that it could be legally used as "evidence". *cf.* Title IV (outmoded evidentiary pleading restrictions); Title VI (deposition); Title VII (illegal sources of information).

> "The bill has 10 titles *designed to improve our evidence* — gathering procedures and processes in the investigation of organized crime."
>
> 116 *Cong. Record* 962 (Senate, January 23, 1970, Column 3), emphasis added.

> "Highly relevant . . . to his selection of an appropriate sentence is the possession of the fullest *information* [*not evidence*] possible concerning the defendant's life and characteristics."
>
> *Id.* at 963, Column 2, brackets in the original, emphasis added.

To ignore the obvious dichotomy between "evidence" and "information" which runs through the whole of the 1970 enactment — is to do gross violence to statutory construction. Stating below,

> ". . . any statute which fairly provides use and derivative use immunity is sufficient . . .," (Appendix C, p. 5, lines 27-29),

the Court simply begs the question. The issue is does *this* statute [§7(a)(10)] — even assuming purely *arguendo* a desire to add *derivative use* immunity to the already existing *use immunity* — provide co-extensive immunity in light of the information/evidence dichotomy which instantly and independently vitiates any possible co-extensiveness of immunity. A statute which is constitutionally required to provide use and derivative-use immunity for all "information", but instead expressly provides use and derivative-use immunity only for the more narrow category of "evi-

dence", cannot pass constitutional muster. Statutes with criminal import must be construed narrowly in favor of defendants where substantial rights are involved. *Smith v. United States,* 360 U.S. 1, 9 [3 L.Ed.2d 1041, 79 S.Ct. 991, 997] (1959). That long established principle of construction clearly applies here. Section 7(a)(10) cannot be construed as providing constitutional immunity co-extensive with §6002 *(Kastigar, supra)* without violating the express language of the statute and violating well established canons of statutory construction.

3.

Petitioner's constitutional situation is factually unique. He sits in the penumbra of pre-trial press coverage so great as to vitiate the possibility of a fair trial, the penumbra of financial poverty in bankruptcy litigation and the clear umbra of self-incrimination. The media (print, broadcast, and film) coverage of the Equity Funding Scandal superseded even "Watergate" when it was first revealed in April, 1973. The issue will be raised and documented in petitioner's forthcoming criminal appeal, but he raises here the fundamental unfairness surrounding the massive publicity of fact and allegation which existed at the instant first meeting of creditors.

How can petitioner possibly receive meaningful immunity when his every word is telegraphed around the world?

Furthermore, the continued first meeting of creditors herein was attended by the very prosecuting agencies who were to investigate and convict Petitioner criminally. *cf.* R.T. June 25, 1974: William J. Rathje, Assistant United States Attorney; Ralph H. Erickson, Assistant General Counsel, Securities and Exchange Commission; Richard A. Castro Securities and Exchange Commission. Furthermore, the person ejected from the December 11, 1973, First

Meeting of Creditors (R.T. that date, p. 21, lines 5-9) was in fact an FBI agent.

In addition to testifying at the instant meeting, Petitioner was concurrently subjected to:

(1) Several sessions of questioning by the Securities and Exchange Commission pursuant to an Order of Investigation;

(2) Investigation by the Trustee in Reorganization for EFCA;

(3) Numerous and widespread civil litigations in several courts across the United States, the majority of which are presently pending in consolidated and class actions before the United States District Court, Central District of California, under MDL Docket No. 142, with an aggregate of hundreds of plaintiffs and defendants (including Petitioner);

(4) A one hundred-five (105) count federal criminal indictment in the Central District of California involving twenty-two (22) defendants, including Petitioner;

(5) A criminal action in the State of Illinois;

(6) Petitioner's personal bankruptcy — out of which this petition arises, and other hindrances (loss of employment) and harassments resulting from his work on the independent audits at EFCA.

The combination of massive publicity and massive litigation served to create an atmosphere of prejudicial information — and flow of information — which made mockery of any attempted grant of immunity. The very purpose of *derivative use* — and this is constitutionally mandated — is to insure that compelled testimony cannot serve to lead to other incriminating evidence. *Kastigar, supra,* at 460. Allowing compelled testimony as herein where the bank-

rupt's information is instantly disbursed to hundreds of lawyers, litigants, investigatory agencies, and the news media renders derivative-use immunity constitutionally inadequate. In this kind of situation only transactional immunity is co-extensive with Fifth Amendment purposes. Only transactional immunity could assure that compelled testimony would not inadvertently and untraceably reach the prosecutor. Only transactional immunity could insure constitutional fairness in legally compelling testimony in the instant situation.

4.

It was apparent from the inception of the instant first meeting of creditors that creditors' interrogation had nothing to do with the instant bankruptcy proceeding. Their singular concern was the gathering of testimonial evidence against bankrupt Petitioner, which evidence they could use in their currently pending civil actions (or possibly even turn over to the United States Attorney to assist in the criminal prosecution). Creditors' questions regarding Petitioner's audit functions at EFCA could not be seriously calculated to lead to the discovery of assets. Discovery of assets is really the only reasonable purpose for creditors' examination in a *personal* bankruptcy proceeding. Here we have *straight* bankruptcy, not a Chapter X:

> "In a straight bankruptcy, the court is concerned with the efficient administration of the estate, the equitable distribution of assets to creditors and the discharge of worthy bankrupts. The provision for examination of the bankrupt is designed to further these purposes. . . . However broad the scope of examinations may be, *the only information relevant to the administration of the estate will be that which implements the discovery of assets, the equitable distribution thereof, and the discovery of grounds for objection to discharge.*"

Feder, *supra,* at 106-107.

Those purposes were clearly abused herein. Virtually every question propounded below was designed to elicit non-bankruptcy discovery, *i.e.* information solely for use in concurrent multi-district (and/or criminal) litigation, *not* aimed at "discovery of assets, equitable distribution thereof, and the discovery of grounds for objection to discharge." Such abuse of examination of the bankrupt should not be countenanced by this Court. The situation was aggravated by the Stay Order of Judge Lucas (in the MDL actions) *staying ALL discovery.* That it clearly prejudiced Petitioner by rendering him unable to posit opposition to the Contempt Reference can be clearly seen at R.T. May 13, 1974, pp. 6-8; 17:8-9; and 21:22 through 22:2.

5.

A. Section 7(a)(10) cannot be constitutional without statutory objective standards to insure the non-dissemination of compelled testimony pursuant to it or Bankruptcy Rule 205(b). *Kastigar, supra,* held that a "heavy burden" exists upon the prosecutor, a burden which consists not merely in negating the taint but also the "affirmative duty" of proving the "legitimate source" of the information or evidence. 406 U.S. at 460.

Note that neither *Kastigar* nor §§6001-6005 articulate objective standards to be used in assessing whether or not the prosecutor has met his "heavy burden" and "affirmative duty." A standardless statute which compels testimony against a legitimate Fifth Amendment privilege cannot be constitutional because "co-extensiveness" is being determined *ad hoc.* The Fifth Amendment cannot be left to the whim of the prosecutor's conclusory denials that his sources were independent from the compelled information. To date, there are no constitutional standards to determine

"independent legitimate sources." The problem is critical in the instant context of the admixture of massive publicity and massive litigation. The "independent" prosecution witness may give testimony which is unwittingly derived from conversations with parties (or attorneys, or court personnel, or third parties who were present when the bankrupt testified at the first meeting of creditors). It is especially abusive herein where creditors' counsel, who are the same counsel for the same parties in the massive consolidated multi-district litigation, *used the bankrupt's compelled testimony as a basis for propounding questions which were asked to almost every witness at the scores of MDL dispositions, many of whom were witnesses in the criminal trial.* Not only were the instant testimony and bankruptcy schedules used against the bankrupt in massive civil discovery, but they were also used by the prosecution in the criminal trial. (As one of many examples, *e.g.* information regarding outstanding loans to Mr. Levin and others — R.T. First meeting of creditors, December 11, 1973, p. 20, lines 13-16, was used in the criminal trial, R.T. criminal trial, Vol. 54, p. 4251, lines 9-14, April 25, 1974.) It is *de facto* unconstitutional to grant illusory immunity in principle only, knowing that no statutory standards exist to effectuate its application.

B. *Kastigar, supra,* dealt with §6002 solely in the *grand jury* context. Grand jury proceedings are totally *secret.* Rule 6(e), Federal Rules of Criminal Procedure. Not so herein. *No protective veil of secrecy shelters bankrupts from their coerced testimony.* Herein petitioner's testimony remained totally unprotected from procedural safeguards to assure its non-dissemination. On no occasion was anyone who was present at the first meeting and continued first meetings of creditors ever orderd to refrain from publicizing the information or telling the prosecuting authorities what they had learned. Indeed, as hereinbefore

stated (pp. 14-15, *ante*) prosecuting, investigating, and regulatory authorities actually attended the first meeting and continued first meetings below.

The instant "immunity" is additionally unconstitutional in that it authorizes *blanket surveillance* via blanket immunity of *all* bankrupts — not merely those who (in the grand jury context) have already excited the prosecutor's attention. In effect §7(a)(10) creates an illegal blanket waiver of Fifth Amendment privilege and privacy *without regard to individual necessity for such.* It represents unwarranted intrusion into every bankrupt's personal and private affairs and disallows resort to the Fifth Amendment right to silence. Such blanket and unfair surveillance cannot be contenanced by this Court. Immunity, if it must exist, must be administered on an individual basis (that was the very purpose of §§6001-6005 enacted in 1970). It cannot — as in §7(a)(10) — be in blanket form and blanket effect.

6.

Petitioner was denied due process when he was forced to appear without written notice of contempt, time to prepare, independent hearing before the bankruptcy referee; and pursuant to inadequate reference.

The Bankruptcy Act specifies exacting procedures which must be precisely followed:

> "... in order that the court may take cognizance of the offense and punish the offender, he *must be proceeded against strictly in accordance with the mode pointed out by the Bankruptcy Act,* and *any deviation from that procedure the bankrupt may take advantage of* .... the statutory procedure being full and complete *must be strictly followed and a failure to do so will be fatal."*

2A *Collier on Bankruptcy,* ¶41.09, p. 1599 (14th ed., 1974), quoting *In re Gitkin* (D.C., Pa.), 21 Am.B.R. 113, 164 Fed. 71, emphasis added.

The Reference herein below — a correct copy of which is appended herewith as Appendix D — was deficient in (1) failing to specify if the contempt were civil or criminal; (2) failing to specify if the refused questions were material.

The first failure, *i.e.,* to specify the *kind* of contempt, is alone fatal to the Reference — and therefore fatal to the contempt. Bankruptcy Rule 920 — *cf.* Appendix A herein — in section (2) thereof specifically requires "notice" and "hearing" before the referee prior to any adjudication of contempt [other than §41(a)(2) contempts — not pertinent here]. The appellate court below agreed, but held the instant matter governed by Bankruptcy Rule 920(4), not 920(2), therefore obviating that "hearing" and "notice" before the referee. Appendix C, p. 3, lines 7-8. But what the appellate court below overlooked was the *independent* written "notice" requirement, *supra,* which must be strictly contained in the Reference to the District Court pursuant to Rule 920(4).

In failing to specify the *kind* of contempt being sought pursuant to Rule 920(4), the instant Reference denied Petitioner due process by misleading him into thinking the anticipated contempt were *criminal,* when in fact it turned out to be *civil.* thus denying Petitioner his expected right to a jury trial. *Muniz v. Hoffman,* 422 U.S. 454 [45 L.Ed. 2d 319, 95 S.Ct. 2178 (1975)].

The deletion of the *kind* of contempt is especially fatal herein as contrary to the very purpose of the new Bankruptcy Rules. In amending §41(b), Bankruptcy Rule 920 — which was itself patterned after Rule 42, Federal Rules of *Criminal* Procedure (2A *Collier, supra,* at 1591) — expressly recognized the contemnor's right to jury trial.

Bankruptcy Rule 920(4)(c). Because of the misleading and legally inadequate Reference below Petitioner was prejudiced by not being able to prepare for the unexpected hearing *re civil contempt.* Petitioner anticipated full jury trial safeguards in the instant contempt, but was suddenly and without notice denied them.

As can be seen from the hearing before the District Court (R.T., May 13, 1974, pp. 6-7) Petitioner was unprepared and unable to file opposition papers through no fault of counsel.

Petitioner cannot be in contempt herein because of the inherently defective nature of the Reference below.

CONCLUSION

For the foregoing reasons this Honorable Court must grant this petition to correct egregious errors below.

DATED: July 28, 1975

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INDEX TO APPENDICES

United States *Constitution,* Amendment V (in part):

> "... nor shall be compelled in any criminal case to be a witness against himself...."

11 U.S.C. § 25(a)(10):

> § *25. Duties of bankrupts*
>
> (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge: *Provided, however,* That when the bankrupt is required to attend for examination, except at the first meeting and at the hearing upon objections, if any, to his discharge, he shall be paid actual and necessary traveling expenses for any distance in excess of one hundred miles from his place of residence at the date of bankruptcy: *And provided further,* That the court may for cause shown, and upon such terms and conditions as the court may impose, permit the bankrupt to be examined at such place as the court may direct whether within or without the district in which the proceedings are pending;

Bankruptcy Rule 920

> (a) *Contempt Committed in Proceedings Before Referee.—*

(1) Summary Disposition by Referee. Misbehavior prohibited by § 41a(2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(2) Disposition by Referee upon Notice and Hearing. Any other conduct prohibited by § 41a of the Act may be punished by the Referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Limits on Punishment by Referee. A referee shall not order imprisonment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(4) Certification to District Judge. If it appears to a referee that conduct prohibited by § 41a of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

(b) *Contempt Committed in Proceedings Before District Judge.*—Any contempt committed in proceedings before a district judge while acting as a bankruptcy judge shall be prosecuted as any other contempt of the district court.

(c) *Right to Jury Trial.*—Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

18 U.S.C. §§ 6002 — 6005 (Organized Crime Control Act of 1970, Title II):

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against such incrimination, to testify or provide other information in a proceeding before or ancillary to —

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness and order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination, but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance

with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment —

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

§ 6004. Certain administrative proceedings

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment —

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

§ 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

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Counsel for Creditors

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In the Matter of
SOLOMON BLOCK,
ROSALIND BLOCK,
Bankrupts.

In Bankruptcy No. 73-13117

In Bankruptcy No. 73-13118

ORDER RE CIVIL CONTEMPT

Whereas the respondent, Solomon Block, was adjudicated a bankrupt in this court on November 14, 1973, and whereas at the first meeting of creditors on December 11, 1973, and continued first meeting of creditors on January 7, 1974, conducted before the Honorable Russell B. Seymour, Bankruptcy Judge, presiding, the respondent, Solomon Block, refused to answer certain questions more specifically set forth in the transcript of such testimony on said dates which is in exhibit A to the affidavits on file herein in support of the petition for order to show cause re contempt and in Exhibit 1A and B in evidence herein and whereas it

appears that under Section 7(a)(10) of the Bankruptcy Act, 11 U.S.C. 25(a)(10), that respondent is granted immunity from prosecution coextensive of the Fifth Amendment of the United States Constitution privilege and that there is no other good or sufficient reason to excuse the refusal of respondent to answer the questions propounded and ordered answered, and thereafter refused to be answered.

Whereas respondent appeared pursuant to said order to show cause re contempt by counsel and in person before the court and the matter having been submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED:

(1). that Solomon Block respondent herein is hereby adjudged to be in civil contempt of this court for his refusal to answer the questions propounded by counsel for a creditor at the first meeting of creditors and continued first meeting of creditors of Solomon Block, Bankrupt, as more particularly set forth in petitioner's Exhibit 1A and B on pages 45, 58, 60, 66, 73, 74, 75, 76, 77, 81, 83, 84, 86, 87, 88, 89, 90, 92, 93, and 94 and on Exhibit A to the affidavits in support of the petition for order to show cause re contempt herein, following the order of Honorable Russell B. Seymour, Bankruptcy Judge, in said proceeding, to answer said questions and overruling any objection thereto.

(2). Respondent Solomon Block is hereby ordered to be incarcerated by the United States Marshal in such jail or other detention facility as may be appropriate for the life of the pending bankruptcy proceeding or until respondent purges himself of the subject contempt by answering all of the questions so propounded and refused before the Honorable Russell B. Seymour, Bankruptcy Judge in said proceedings.

The said order of incarceration is hereby stayed for ten (10) days, pending further proceedings.

DATED: MAY 17, 1974

United States District Judge
(E. AVERY CRARY)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF SOLOMON BLOCK AND ROSALIND BLOCK, *Bankrupts*	FILED MAY 3, 1976 EMIL E. MELFI, JR. CLERK, U.S. COURT OF APPEALS
SOLOMON BLOCK, *Bankrupt-Appellant,* *vs.* SYLVIA CONSINO, ET AL., *Creditors-Appellees.*	NO. 74-2634 OPINION

Appeal From United States District Court for the Central District of California

Before: ELY, CHOY and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Block appeals from a contempt citation due to his failure to answer certain questions propounded by creditors during a creditors' meeting incident to his bankruptcy. Block argues that the contempt procedures used by the referee were not in accordance with Bankruptcy Rule 920, and that the immunity provided by section 7(a)(10) of the Bankruptcy Act, 11 U.S.C. §25(a)(10), was insufficient to protect Fifth Amendment rights against self-incrimination. Neither argument has merit, and we therefore affirm.

I. Statement of Facts.

Appellant Block is a certified public accountant, and was employed by Seidman & Seidman, former auditors for Equity Funding Corporation of America. As one integrally involved in the audit of Equity Funding, Block finds himself at the center of the litigation emanating from this massive scandal. Block is a defendant in several civil and criminal lawsuits arising therefrom.

Block filed for personal bankruptcy, and at the first meeting of creditors refused on Fifth Amendment grounds to answer certain questions, generally relating to his duties at Equity Funding, propounded by counsel for certain creditors. These creditors were plaintiffs in civil lawsuits filed against Block, *inter alios*, arising out of the purported fraud at Equity Funding. The referee referred the matter to the district judge, who found Block in contempt for his refusal to answer.

II. Bankruptcy Rule 920.

Block contends that the procedures of rule 920(a)(2) were not followed in that there was no contempt hearing, upon notice, before the referee. The referee held no hearing, but certified the facts to the district judge for a determination. Block does not contend that there was no hearing or no notice at the district court, but argues that he was denied the "preliminary" hearing at the Bankruptcy court level, as mandated, he claims, by Bankruptcy Rule 920(a)(2). That argument must fail.

The text of rule 920(a) is set forth in the margin.[1] Block

(1) Rule 920. Contempt Proceedings.

(a) Contempt Committed in Proceedings Before Referee.

(1) *Summary Disposition by Referee.* Misbehavior prohibited by §41a(2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(2) *Disposition by Referee upon Notice and Hearing.* Any other conduct prohibited by §41a of the Act may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) *Limits on Punishment by Referee.* A referee shall not order imprisonment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(4) *Certification to District Judge.* If it appears to a referee that conduct prohibited by §41a of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

(2) As the Advisory Committee's Notes point out:

Referee's authority respecting minor contempts.

Paragraph (4) of subdivision (a) of this rule retains for all but minor contempts the certification procedure of §41b of the Act. If it appears to a referee that conduct in proceedings before him may warrant imprisonment or a fine of more than $250, the referee *should* proceed under this paragraph. [Emphasis added].

relies heavily upon the first sentence of rule 920(a)(2), which provides: "[a]ny other conduct prohibited by §41a of the Act may be punished by the referee only after hearing on notice." However, this language merely means that the referee, *if* he does not refer the case under rule 920(a)(4), must hold a hearing for conduct other than that described in rule 920(a)(1), but does not preclude him from refering the case to the district judge without a hearing. Indeed, the referee may not order imprisonment or a fine of more than $250, and should forward the case to the district judge if more severe punishment is warranted.[2] In such a case, neither the logic nor the language of rule 920 requires a duplicative hearing before the referee.

III. Immunity Provided by Section 7(a)(10) of the Bankruptcy Act.

Block makes a frontal assault upon the immunity provided by section 7(a)(10) of the Bankruptcy Act, 11 U.S.C.

§25(a)(10), and argues that the scope of that statute is too narrow to be coextensive with the privilege against self-incrimination afforded by the Fifth Amendment, and hence that the statute is void on its face. Alternatively, he argues that given the unusual circumstances of this case only transactional immunity is sufficient to protect him.

A. Section 7(a)(10) Is Constitutional On Its Face.

In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court rejected the notion that the Fifth Amendment requires full transactional immunity, and sanctioned a statute providing use and derivative use immunity.[3] The statute at issue in *Kastigar* was 18 U.S.C. §6002, a part of the Organized Crime Control Act of 1970.[4]

Section 7(a)(10), also a use and derivative use statute, was enacted along with section 6002, and was designed in conformity with section 6002;

(3) Transactional immunity grants immunity from prosecution to which the compelled testimony relates. Use and derivative use immunity grants immunity from the use of the compelled testimony and evidence derived therefrom. 406 U.S. at 443.

(4) 18 U.S.C.. §6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

> "Section 206 — This section makes a conforming amendment to [Section 7(a)(10) of] the Bankruptcy Act of July 1, 1898." H.R.Rep. 91-1118, 91st Cong., 2d Sess. 14 (1970).

See Goldberg v. Weiner, 480 F.2d 1067, 1070 (9th Cir. 1973) (per curiam). In pertinent part, section 7(a)(10) provides that the bankrupt may be examined at the first meeting of creditors, but that

> "...no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding...."

Block attempts to distinguish section 7(a)(10) from section 6002. We first note that the overriding concern of the court in *Kastigar* focused upon the conflict between transactional immunity and use and derivative use immunity, and not upon the particular linguistic formulation of use and derivative use immunity found in section 6002:

> "This Court granted certiorari to resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use' immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ('transactional' immunity)." 406 U.S. at 443.

The language used in section 6002 is not sacrosanct; any statute which fairly provides use and derivative use immunity is sufficient under the Fifth Amendment.

We have previously held that section 7(a)(10) is coextensive with the Fifth Amendment, and with section 6002, and reaffirm that holding herein. *Goldberg v. Weiner, supra*, In *Goldberg*, we rejected distinctions based upon variations in language of the two sections, and herein we reject the distinctions suggested by Block.

Block points to the fact that section 7(a)(10) prevents use of testimony or *evidence* derived therefrom, whereas section 6002 prevents use of testimony or other *information* derived therefrom. Block argues that "information" is broader than "evidence," and that the defendant's theories, understandings, and interpretations could be used against him under section 7(a)(10) immunity, but not under section 6002 immunity since, according to Block, such testimony would be "information," but not "evidence." Thus Block concludes that the section 7(a)(10) protection is narrower than the section 6002 protection.

Congress did not intend, nor will we imply, any difference in scope of the two statutes based upon this language. Section 6001 defines "other information" as "any book, paper, document, record recording, or other material." The legislative history makes it clear that "other information" merely refers to non-oral testimony, and is not used, as Block would suggest, to distinguish "theories" from "evidence":

> "Subsection (2) defines 'other information' to include books, papers, and other materials. The phrase is used in *contradistinction to oral testimony*. It would include, for example, electronically stored information on computer tapes. Its scope is intended to be comprehensive including all information given as testimony, but not orally." H.R. Rep. No. 91-1188, 12 (1970). (Emphasis added).

Furthermore, the language in section 7(a)(10) ("testimony, or any evidence which is directly or indirectly derived from such testimony") is very similar to the Supreme Court's definition of use and derivative use immunity in *Kastigar* ("testimony and evidence derived therefrom"). 406 U.S. at 443. Use and derivative use immunity, thus defined, was held constitutional in *Kastigar*, and we see no basis to depart from that holding with respect to section 7(a)(10). Thus, we hold that a fair reading of the statute

demonstrates that section 7(a)(10) does provide use and derivative use immunity coextensive with the Fifth Amendment privilege against self-incrimination. *See United States v. Seiffert*, 463 F. 2d 1089 (5th Cir. 1972).

B. Section 7(a)(10) As Applied to Block.

Block argues that the immense publicity surrounding the Equity Building scandal, coupled with the great amount of litigation involved therein (including a 105-count federal indictment against him and others), is such that the use and derivative use immunity of section 7(a)(10) is insufficient to protect his privilege against self-incrimination. Quoting extensively from Justice Marshall's dissent in *Kastigar*, Block essentially asks this Court to rewrite *Kastigar* and hold that use and derivative use immunity is not sufficient for Block, and that full transactional immunity is required herein.

This argument misses the mark. It confuses the issue of whether use and derivative use immunity is sufficient with the issue of whether, in fact, a defendant will be immunized from the use or derivative use of his statements. The statute, section 7(a)(10), provides sufficient protection; at the proper time, Block may seek to ensure that its mandate is followed by attempting to suppress any evidence that he claims is the fruit of his testimony.

At this point, Block will be protected by the heavy burden placed upon the Government to demonstrate that the evidence was derived from a legitimate source independent of the compelled testimony. *Kastigar*, 406 U.S. at 460. Block argues that the testimony will spread in such diverse manners that the prosecutor may not know that the source of evidence he might use actually flowed from the hearing and that he might be able to allege in good faith that his evidence did not flow from the hearing. However, a good faith allegation that the evidence is not the

fruit of the immunized testimony is not sufficient; the Government must show how it acquired all of the evidence. *United States v. Seiffert, supra,* 463 F.2d at 1092. As the Court stated in *Kastigar*:

> "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460.

Thus, it may be, as Block points out, that information from the bankruptcy testimony will leak to the prosecution. However, Block is still protected since the Government may not use this evidence unless it can prove an independent, collateral source. *See United States v. Catalino,* 491 F. 2d 268, 272 (2d Cir.), *cert. denied,* 419 U.S. 825 (1974).[5] In addition, nothing said herein is designed to preclude the district judge from resorting to expedients, such as requiring the presence of prosecutors at the time of Block's testimony or immediately bringing such testimony to the attention of such prosecutors, as he may determine proper to protect Block from use of his testimony.

Block also complains that he is not afforded the secrecy of a grand jury proceeding, as was the case in *Kastigar.*

---

(5) Although it is true that the creditors did not complete their questioning of Block, our review of the questions propounded to Block leads us to conclude that the issue of an independent, collateral source will be a relatively simple one. The testimony will relate to Block's job function at Equity Funding and will, in general, consist of: (a) semi-public, easily accessible information that the Government can demonstrate was obtained from an independent source (i.e., what Block's duties were, which audits he worked on, who worked for him, and so forth), or (b) extremely personal information that the Government will have great difficulty in adducing a collateral source, and that the district court will be highly skeptical about admitting (i.e., whether or when Block actually knew of certain fraudulent acts, his conversations and transactions with other defendants, and so forth).

The Court in *Kastigar* in no way limited the scope of use and derivative use immunity to a grand jury proceeding. Indeed, it strikes us that whereas a witness may be compelled to appear and testify before a grand jury, Block, on the other hand, has voluntarily placed himself before the bankruptcy court. Block cannot be heard to complain, protected as he is by use and derivative use immunity, about the open forum of the creditors' meeting.

In short, Block argues that the statute will not work. The court in *Kastigar* clearly rejected any contention that the protection afforded by use and derivative use immunity will be impossible to enforce. 406 U.S. at 459-60.

AFFIRMED.

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Counsel for Creditors

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In the Matter of SOLOMON BLOCK, and ROSALIND BLOCK, *Bankrupts.*	In Bankruptcy NO. 73-13117 REFEREE'S CERTIFICATE NO. 73-13118

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

I, RUSSELL B. SEYMOUR, herewith certify:

1. SOLOMON BLOCK was duly adjudicated bankrupt in this court on the 14th day of November, 1973.

2. That on December 11, 1973, and January 4, 1974, the bankrupt was examined at the First Meeting and Continued First Meeting of Creditors in the within proceedings by MARSHALL B. GROSSMAN and JACK CORINBLIT, as attorneys for creditors. That the said bankrupt, SOLOMON BLOCK, refused to answer questions propounded to him after objections thereto were overruled by the Bankruptcy Judge and the bankrupt was ordered to answer the questions, all as more particularly set forth in the Transcript lodged with the District Court concurrently with the filing of this Certificate.

3. That the said conduct upon the part of the bankrupt, SOLOMON BLOCK, constitutes a contempt of this Court.

4. That the Petitioner has filed her Petition with me, RUSSELL B. SEYMOUR, setting forth the above facts and praying that I transmit to your Honors this Certificate and that I issue an Order to the bankrupt directing him to show cause why he should not be adjudicated in contempt of Court by reason of the premises.

5. Herewith transmitted with this Certificate are the subject Petition and Transcript of Proceedings on January 7, 1974.

DATED: May 7, 1974

ss/ Russell B. Seymour

RUSSELL B. SEYMOUR, BANKRUPTCY JUDGE

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1976.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-148

SOLOMON BLOCK,

Petitioner,

vs.

SYLVIA CONSINO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

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Petitioner,

vs.

SYLVIA CONSINO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents to these proceedings, creditor claimants against Petitioner in his bankruptcy proceeding now pending in the United States District Court for the Central District of California, respectfully oppose the petition for a writ of certiorari in the within matter.

Opinions Below.

The Order of the District Court (App. B of Petition) is not reported. The Opinion of the Court of Appeals for the Ninth Circuit (App. C of Petition) is reported at 535 F.2d 1165.

Jurisdiction.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1). The Respondents in this case respectfully submit that, for the reasons

set forth herein, this Court lacks jurisdiction over the present case because it is moot.

Questions Presented.

1. Whether Petitioner could properly be adjudged in civil contempt for his refusal to answer certain questions propounded by creditors during a creditor's meeting incident to his bankruptcy proceedings on the ground that answers to such questions might tend to incriminate him, despite the fact that under Section 7 (a)(10) of the Bankruptcy Act, 11 U.S.C. §25(a)(10), none of his testimony, nor any evidence which is directly or indirectly derived from such testimony, may be offered against him in any criminal proceeding?

2. Whether Petitioner could properly be adjudged in civil contempt for his refusal to answer certain questions propounded by creditors during a creditor's meeting incident to his bankruptcy proceedings on the ground of irrelevancy after the bankruptcy judge ruled such questions relevant and otherwise proper?

3. Whether, under the procedures established in Bankruptcy Rule 920, the bankruptcy judge was required to hold a hearing with respect to Petitioner's contempt prior to certifying the facts concerning such contempt to the district judge, which hearing would duplicate the hearing to be had before the district judge?

Statement.

Petitioner was an accountant employed by the auditors of Equity Funding Corporation of America ("EFCA") during the period of time that a fraudulent scheme of massive proportions was being perpetrated on the national securities market, unsuspecting investors

in EFCA, the Securities and Exchange Commission, and other governmental agencies and persons. In an indictment returned in 1973 by the Grand Jury for the Central District of California, Petitioner, together with 21 other persons, was accused of knowingly and willfully participating in and furthering that fraudulent scheme.

While Petitioner would have this Court believe that he was one of the "primary victims of the fraud at EFCA" (Pet., p. 3), and that the indictment was "erroneously returned against him" (Pet., p. 4), he has failed to disclose to this Court that in May, 1975, he was convicted by the jury for his crimes committed in connection with the fraudulent scheme, and that sentence has been pronounced upon him by the District Court. That conviction is now on appeal to the United States Court of Appeals for the Ninth Circuit.

This petition stems from Petitioner's voluntary bankruptcy proceedings. In those proceedings, at the first meeting of creditors and the continued first meeting of creditors, the Respondents, scheduled creditors of Petitioner, and plaintiffs in the multidistrict litigation known as *Equity Funding Corporation of America Securities Litigation*, M.D.L. Docket No. 142-MML, appeared and propounded certain questions to Petitioner.

Petitioner refused to answer those questions on the ground that answers to such questions might tend to incriminate him and that they were irrelevant. The bankruptcy judge overruled his objections and ordered him to answer, but Petitioner persisted in his refusal to answer. Thereafter, the bankruptcy judge certified the facts to the district judge.

On May 17, 1974 the district judge ordered that Petitioner be adjudged in civil contempt for his refusal. (App. B of Petition.) The district judge further ordered that Petitioner be incarcerated until he purged himself of his contempt or until the bankruptcy proceedings were completed, and stayed the order of incarceration for ten days. (App. B of Petition.)

On June 25, 1974, Petitioner appeared before the bankruptcy judge and he answered the specific questions that he had previously refused to answer. Thereafter, Petitioner contended that he had purged himself of his contempt. This contention was disputed by the Respondents.

Petitioner appealed from the order adjudging him in civil contempt. Pending appeal Petitioner was not incarcerated.

On May 3, 1976 the United States Court of Appeals for the Ninth Circuit affirmed the District Court's order, *Block v. Consino*, 535 F.2d 1165. After the district court's order was affirmed, Respondents made a motion to enforce the order. The District Court ruled that Petitioner had in fact purged himself of contempt, and denied the motion to enforce the order.

Contrary to the implied suggestion in the Petition (Pet., p. 5), Petitioner has never been incarcerated under the order adjudging him in civil contempt.

ARGUMENT.

The Petition fails utterly to state any reason why this Court should grant certiorari and thereby has failed to comply with Rule 19 of this Court. Instead of articulating any such reason, the Petition merely sets forth Petitioner's argument on the merits that, in his view, the opinion of the Court of Appeals for the Ninth Circuit was in error. That does not suffice. Moreover, in the present procedural posture of this case it is plain that no sufficient reasons could be given why this Court should grant certiorari.

1. Certiorari Should Be Denied Because the Controversy Is Now Moot.

As set forth in the Statement, *supra*, the District Court ruled Petitioner has purged himself of his contempt. In view of that fact the controversy which resulted in District Court's order adjudging Petitioner to be in civil contempt of that Court for his refusal to answer certain questions is now moot. *United States v. Watson Chapel School District No. 24*, 446 F.2d 923, 938-939 (8th Cir. 1971); *Federal Trade Commission v. Stroiman*, 428 F.2d 808, 808-809 (8th Cir. (1970); *Kelley v. United States*, 199 F.2d 265, 266-267 (4th Cir. 1952); *Cf. Fowler v. Huber*, 437 F.2d 1117 (5th Cir. 1971).

For this reason alone, the petition for a writ of certiorari should be denied.

2. Petitioner Has Failed to State Any Reason Why This Court Should Grant Its Writ of Certiorari.

Petitioner has shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that has not previously been

decided by this Court, and certainly no shocking or egregious departure from the normal course of judicial proceedings.

To the contrary, Petitioner brings to this Court arguments so slight in substance as to border on the invisible. Petitioner has failed to recognize that this Court does not sit to correct every claimed error occurring in the inferior courts of the United States, but to grant review by writ of certiorari only when special and important reasons for the exercise of this Court's discretionary jurisdiction are shown to be present. Petitioner has not undertaken to show that this case presents such reasons, and has thereby failed to comply with this Court's Rule 19.

3. The Petition Is Without Merit.

The opinion of the United States Court of Appeals for the Ninth Circuit announced below, *Block v. Consino, supra,* 535 F.2d 1165, completely disposes of each of the questions presented by Petitioner.

Briefly stated, Petitioner has no privilege under the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution to refuse to answer the questions put to him by his creditors during a creditor's meeting incident to his bankruptcy proceedings because Petitioner is granted immunity against the use of his testimony and evidence derived directly or indirectly therefrom in any criminal proceeding by Section 7(a)(10) of the Bankruptcy Act, 11 U.S.C.

§25(a)(10). This immunity is co-extensive with the Fifth Amendment privilege. *Kastigar v. United States,* 406 U.S. 441 (1972).

There is no significant difference between Section 7(a)(10) of the Bankruptcy Act and the provisions of the Organized Crime Control Act of 1970 upheld in *Kastigar*. Moreover, even if such differences did exist, which is not conceded, the opinion of the Court of Appeals which construes the statute in a manner which avoids the constitutional question should not be disturbed so long as such construction is fairly possible. *Ashwander v. TVA*, 297 U.S. 288, 346-348 (Brandeis, J., concurring).

It is sheer sophistry to contend that Title II of the Organized Crime Control Act of 1970, 18 U.S.C. §§6001-6005, which was enacted simultaneously with the 1970 Amendments to Section 7(a)(10) of the Bankruptcy Act, was designed to repeal those very amendments. (Pet., pp. 5-9.)

The questions asked of Petitioner directly concerned, among other relevant subjects of examination, Petitioner's liability to Respondents for his complicity in the massive EFCA fraudulent scheme, and were thus relevant to show that his debts to Respondents were not dischargeable. However, even if such questions were not relevant, which is not conceded, it is an imposition to ask this Court to revise decisions of bankruptcy judges on mundane matters of the law of evidence.

Finally, it plainly appears that the procedure followed by the bankruptcy judge exactly comported with the requirements of Bankruptcy Rule 920.

Conclusion.

For the foregoing reasons and authority, this Court should deny the petition for certiorari.

Dated: August 31, 1976.

Respectfully submitted,

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